The San Fernando Valley Business Journal has once again turned to some of the leading business attorneys in the region to get their assessments regarding the current state of labor and employment legislation, the new rules of hiring and firing, traps to avoid, and the various trends that they have been observing, and in some cases, driving. Below is a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business law today – from the perspectives of those in the trenches of our region today.
What would you say is the most significant new law affecting businesses in 2017?

ROSENBERG: California’s Fair Pay Act is one of the most controversial employment laws on the books today. It requires employers to pay employees willing to work a standard workweek an equal pay rate.

GABLER: Sensitivity training is the most significant new law. It is fraught with ambiguity and the payoff for plain-vogues is massive.

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'California’s Fair Pay Act is one of the most controversial employment laws on the books today. We predict a veritable tsunami of new equal pay litigation because the legal framework is fraught with ambiguity and the payoff for plaintiffs and their lawyers could be huge.'

RICHARD S. ROSENBERG

'Bendavid: In mediation, a neutral third party engages in “shuffle diplomacy” between the parties to see if matters can be resolved. It virtually always means employers will pay agreed upon sums of money to employee plaintiffs and their attorneys. But mediating typically costs less than defending claims in court, and risking potentially large judgments if there is liability exposure. A good mediator will demonstrate to both sides the weaknesses in their respective cases so that the parties can understand the risks if they continue in the litigation process. Sometimes employers will come in to mediation with large demands that make no sense given the damages analysis and the claims. A neutral mediator can help bring them down to reality about the value (or lack of value) of their case. Similarly, mediation can be expected to tell employers how juries or judges may perceive cases and defenses in an effort to convince employers to buy their peace.

How do you advise clients regarding the implementation and enforcement of non-competes and other restrictive covenant agreements?

BENDEDAV: Non-competes in California are generally unenforceable, with limited exceptions. In contrast, an employer has a right to protect trade secrets and other confidential information — that means creating policies, confidentiality agreements and implementing other procedures to protect that information from improper use, disclosure or dissemination, including to the employee’s new employer.

Gabler: Non-compete clauses are generally unenforceable in California, except in certain limited circumstances (such as in the sale of a business). While employers can prohibit competition during employment, a departing employer has the right to work with any employer of his choice in the future. However, employers are not permitted to use the trade secrets of the former employer to compete, nor to benefit themselves or others.

The employee handbook continues to be the most significant document an employer should have in the workplace. When prepared properly and updated regularly, handbooks can protect the employer, bind the employee, defend against a claim and support management efforts. Handbooks are one of the first documents requested in any employment law claim, and can provide clear evidence of the employer’s policies and practices.'

KAREN L. GABLER

'Successful employment litigation is fraught with uncertainty and uncharted territory for employers. For plaintiffs and their lawyers is a question of “who wins” and “how much.”

KAREN L. GABLER

Sue M. Bendavid

A distinction is a systemic problem leading employees feeling they were discriminated against by their supervisor as a result of their race or other protected characteristic (e.g., when one employer is terminated while another is simply written up for the same policy violation). This is because of a “straw that broke the camel’s back situation,” ensure there is a record of previous transgressions. Employers should also ensure that the discipline is not as a result of the employee exercising a legally protected right. For example, an employee who has a work related injury should not be disciplined for submitting a workers compensation claim. Keep in mind the protected activities and the numerous leave laws that an employer can establish.

JUNE 12, 2017
and federal laws before writing up an employee.

GABLER: The most significant error made by employers is neglecting to document performance issues and resulting disciplinary actions. Employers must remember that "if you can't prove it, it didn't happen!" When the employer fails to document its reasons for discipline or termination, the employer loses the chance to tell that story, and its reasons for discipline or termination, the employer loses the chance to tell that story, and thus loses control of the situation: the employee is now able to tell the story of what the employer did to her, and the employer promptly finds himself unable to tell the story of what the employer did.

Similarly, the employer who fails to convey its dissatisfaction to the employee loses the opportunity to train and support an existing employee, instead having to invest additional resources in recruiting, hiring and training new employees when things don't work out. On the other hand, some employers express too much personal opinion, frustration, anger or other negative emotions, and the discipline becomes a personal attack rather than a productive discussion of areas of growth. When an employee is attacked and deemed to be incompetent, he simply becomes resentful and shuts down.

At that point, improvement is unlikely, and the relationship will continue to deteriorate.

GABLER: Although the existence of an independent contractor agreement will not automatically create a contractor relationship, it is nevertheless critical to have an enforceable agreement in place to defend the worker's classifications. Ideally, contractor agreements should include, without limitation, reference to the worker's classifications as a contractor (without calling the worker "employee" in the agreement!), the contractor's right to set the work schedule and hire its own staff, the contractor's obligation to pay its own taxes and procure its own insurance, the contractor's right to work with any other clients (provided there is no conflict of interest of compliance), indemnification for the acts or omissions of the other party, and the obligation to arbitrate disputes under the agreement. Random buzzwords or misstated phrases can severely undercut the contractor classification, and employers will be well served to develop the agreement with the assistance of employment law counsel.

BENDAVID: Class actions can arise from a variety of wage and hour issues, and every employer in California will have violations due to simple human error. The most common class action claims arise from meal and rest period violations. Claims for "off the clock" work, failure to properly itemize the pay stub, failure to record all used or accrued paid time off, failure to pay overtime and the corresponding failure to pay minimum wage are common as well. To protect the company, the employer must develop clear, enforceable policies on wage issues, which can show the court that the company was aware of the law and made every effort to enforce it. Then, the employer must track compliance and take action on any violations. Interestingly, a 2015 case held that a company with no penalty payments to any employee at any time must be in violation of the wage and hour laws, because every employee misses a break or a meal period or fails to accurately record their time at some point. It is a better defense to record and pay for the occasional penalty, so that you can show the court that you are aware of the rules and any

GABLER: Employers have to use extreme caution whenever inquiring into criminal background. Because our state law does not permit employers to ask about (or use) arrest and certain conviction records when evaluating job applicants. The simple question “Have you ever been convicted of a crime?” is illegal in California. Further, EEOC has stated that a ban on the hiring all convicted criminals is illegal. EEOC demands a more nuanced process that requires an employer to show that there is a real connection between the criminal offense and the applicant’s intended job duties.'

RICHARD S. ROSENBERG

‘Most employment disputes have far more to do with psychology than with employment law, and are often the result of miscommunication, assumptions, hurt feelings and other aspects of human communication that fall outside the law. Bringing both sides to the table can resolve those issues, make people feel heard on both sides, and create a path to resolution that allows both parties to move forward without further stress or expense.'

KAREN L. GABLER

‘In mediation, a neutral third party engages in “shuffle diplomacy” between the parties to see if matters can be resolved. It virtually always means employers will pay agreed upon sums of money to employee plaintiffs and their attorneys. But mediating typically costs less than defending claims in court, and risks potentially large judgments if there is liability exposure. A good mediator will demonstrate to both sides the weaknesses in their respective cases so that the parties can understand the risks if they continue in the litigation process.'

SUE M. BENDAVID
Protecting your business. Protecting you.

Lewitt Hackman
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Take any internal complaint of discrimination or harassment?

BENDAVID: Promptly investigate (consider using a third party to do so, depending on the circumstances). Obtain statements from the accuser as well as the accused, any potential witnesses and supervisors. Review relevant documents. Carefully document everything thoroughly and throughout the process. Assess the situation and determine whether or not the allegations can be substantiated and if so, ensure corrective action is taken. Inform the complainant about the responsive action taken. Consider reaching out to counsel for compliance guidance along the way.

ROSENBERG: Take it seriously and do a thorough good faith investigation. That’s what the federal and state laws require and that’s what employees have come to expect. We also recommend reviewing the matter with expert labor counsel to be sure that the employer has done enough to address the matter. This is especially important because the California labor code holds employers responsible for the acts of management even if the company leaders were unaware of the offending conduct.

GABLER: Yes, an employer must investigate every complaint of discrimination or harassment, no matter how small and no matter how seemingly frivolous. Employees can bring claims for failure to investigate, failure to prevent, and failure to remedy discrimination and harassment. Taking the necessary steps to look into the situation will protect the employer, but will also provide critical information as to where problems may exist and how best to address them before an employee files a formal claim. Investigations may be conducted by internal personnel, or by a third-party licensed investigator (typically, an attorney or licensed private investigator). If claims of bias or frivolousness in the investigation process are likely, using an outside investigator is more productive to support the effectiveness of the investigation process and the reasonableness of the outcome. The investigation must be very simple, consisting of meetings with the complainant and the alleged wrongdoer, or may be more complicated and expand into interviews with witnesses to any relevant events. Once the involved personnel have shared their stories, the investigator should prepare a written report on the investigation activity and the outcome, both to summarize the findings as well as to prove that a reasonable, timely and thorough investigation was conducted. The employer should then respond in writing to the complainant as well as to the accused, to provide a short summary of the investigator’s findings and any next steps to be taken to remedy the situation.

Does it make sense for businesses to combine their vacation and sick time into a single PTO policy?

BENDAVID: Under the new paid sick leave law, the usage rules only apply to actual paid “sick” days. That’s a good reason to unbundle them from PTO. Otherwise, all of the company’s PTO benefits will be subject to the sick pay law’s onerous carryover, pay stub reporting and usage rules. Also, if the company’s PTO includes vacation, then the entire PTO balance must be paid when the employee leaves paid the employees the employment and the employee can collect stiff penalties for late payment. In contrast, accrued sick pay does not have to be paid out when the employee leaves the employment. This is yet another reason to separate the sick pay benefits from other PTO.

GABLER: You would think combining vacation and sick time into a single PTO policy would make sense, but perhaps not! PTO policies are easier for employers to track, and employers enjoy the flexibility of taking time off without explaining the specific purpose of their absence. That said, a combined PTO policy must comply with both the vacation rules and the sick leave rules (which are more burdensome under the state’s mandatory sick leave laws). As with vacation rules, the PTO policy must provide for accrual and carry over of up to a minimum of 1.5 times the annual leave, or pay out of accrued time at termination. As with the sick leave rules, the employer must frontload the PTO (making it fully available at the outset of employment) or accrue a minimum of 48 hours (or six days, whichever is greater), which often means the employer is granting more PTO at the outset of employment than it might otherwise prefer. City-specific sick leave laws impose even greater burdens. In addition, an employer can require advance notice of vacation and may deny a request for vacation time off, but employers can use sick time unexpectedly and intermittently, with the employer having limited ability to discipline an employee for using available time. For these reasons, employers may wish to separate vacation and sick time, thereby saving money and reducing absenteeism, instead of using a combined PTO policy.

BENDAVID: With the new city ordinances on sick leave, we are recommending that employers not use combined Paid Time Off policies, unless they have a separate standalone sick leave policy that complies with the city’s rules. Also, remember that accrued, unused PTO must be paid on separation from employment, unlike sick leave.

Can an employer legally impose a rule barring the employment of job applicants with criminal records?

GABLER: A blanket prohibition against applicants with criminal records is unlawful discrimination. Employers may consider certain felony convictions only to the extent that the conviction is reasonably related to the job position, among other factors. For instance, applicants with felony child abuse convictions could be rejected for a preschool position, and applicants with felony embezzlement convictions could be rejected for an accounting position. On the other hand, applicants with felony DUI convictions could not be rejected for a job that does not involve driving.

Application questions regarding convictions must include a variety of disclaimers, and the potential for discrimination claims is high. With the growing trend in “ban the box” legislation prohibiting employers from asking about convictions in the application process, employers should eliminate the “conviction question” from applications and interviews entirely, and instead make job offers contingent upon passing a background check. If a conviction appears in that process, analyze whether the timing, nature, scope and outcome of the conviction are sufficiently relevant to the job position that the offer can be lawfully revoked.

ROSENBERG: If you are located within the City of Los Angeles, then you must comply with the City’s new “Ban the Box” ordinance. It restricts private employers in Los Angeles from asking about or requiring the disclosure of criminal history until after a conditional offer of employment is made. If the employer does a post offer crim-
BENDA 

wage pressures? 

that a ban on the hiring all convicted criminals is 

question “Have you ever been convicted of a crime” 

inquiring into criminal background. Because our 

employers have to use extreme caution whenever 

unless your local law says otherwise. However, 

employment based upon a criminal conviction 

City of Los Angeles, you are permitted to deny 

criminal history. If your company is not in the 

remove questions from job applications about 

informing applicants of the ordinance, and to 

so-called “fair chance process” before declining 

employment based upon that information, 

shopping times. Ensure employees are not per- 

their employees take them, they are obligated to 

raise wage rates to $12.00 per hour for employers 

per hour on July 1, 2017; while Los Angeles will 

est minimum wage standards, increasing to $14.00 

San Francisco also has one of the high-

San Francisco has specific laws regarding sched-

regulations, and California laws will generally 

local ordinances carry a higher burden than state 

meeting sales goals 

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layoff may be misconstrued as retaliation. That 

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identified as workers to be laid off – determining 

layoffs. First, establish and document criteria for 

What are some legal issues that com-

companies often overlook during a layoff or 

BENDAVID: There are some rules of thumb to 

reduce the risk of litigation for unlawful termi-

nation or retaliation when downsizing through 

First, establish and document criteria for 

in communicating job expectations (best to 

we handle, the employer did an inadequate job 

criteria and that you have supporting documenta-

Review personnel files to ensure there are no "red flags" that might cause employees to believe 

they were selected for unlawful reasons, e.g., previous 

complaints of harassment, in which case a 

layoff may be misconstrued as retaliation. That 

doesn't mean a person who previously made a 

complaint can't be laid off – it just means employ-

ers should ensure they have legitimate reasons for 

their decisions. The same basic rules apply for 

terminations. Document the reasons and ensure 

an employee is fired for lawful reasons. Don't sugar 

cost performance reviews and exit interviews. 

Telling an employee she is doing a wonderful job and 

then firing him or her leads to shock, anger 

and potentially, employee lawsuits. 

What kinds of trusted advisors should 

growing businesses seek out? 

At a minimum, every business should have 

a trusted employment law attorney, experi-

enced business or corporate law attorney, quality 

insurance agent, and skilled financial professional. 

Each category is critical to a healthy business, and 

all four are necessary to the protection and growth 

of the business. Each of these professionals can 

advise on the best methods to protect the significant 

investment every business owner makes, but they all carry their own areas of expertise and 

skills, all of which overlap but none of which 

replace each other. Beware of the CPAs or the business lawyer who offers advice on employment 

laws and (vice-versa) – the best professionals 

know what they don't know and are willing to 

seek input from other specialists. Make sure that 

each of these professionals can provide insightful 

and creative ideas on growing the business, inter-

nally as well as externally. A trusted advisor is 

 proactive as well as reactive, and can support and 

guide (as well as protect) the business owner. Most 

importantly, make sure the professional cares more 

about the success of your business than her own. 

A trusted advisor doesn’t merely instruct the client on next steps; she asks where the business wants to 
go, and then finds a way to take it there. 

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KAREN L. GABLER 

Many employers erroneously believe that a layoff cannot be legally challenged. The many hundreds of layoff lawsuits filed each year prove otherwise. In every layoff, decisions are made about who to retain and who to let go. Those selected for layoff can sue if they think they were selected for an illegal reason such as their gender, race and the like or because they opposed some employer practice that was illegal. 

RICHARD S. ROSENBERG 

‘With the new city ordinances on sick leave, we are recommending that employers not use combined Paid Time Off policies, unless they have a separate standalone sick leave policy that complies with the city’s rules. Also, remember that accrued, unused PTO must be paid on separation from employment, unlike sick leave.’

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